

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

(CIVIL)

CASE NO. DOMHCV 2018/0055

Between:

CONSTANCE ASTAPHAN

Claimant

and

AUTO TRADE LIMITED

Defendant

Before: The Honourable Madam Justice M E Birnie Stephenson

Appearances:

Mrs Cara Shillingford Marsh for the Claimant

Mrs Singoalla Blomqvist Williams for the Defendant

2022: January 24TH & 25TH

2023: March 8th

JUDGMENT

[1] **Stephenson J.** In this action the defendant claims against the defendant damages for negligence and loss of her vehicle which was on the defendant's premises undergoing repairs during the passage of Hurricane Maria. It is the claimant's case that this is a situation where both the bailment and negligence in failing to make properly secure the vehicle and to make an insurance claim for the benefit of the claimant arose from the same set of facts.

- [2] Witness statements and summaries as filed for each of the witnesses who were present to testify were adopted as their evidence in chief and that evidence was supplemented by oral evidence. The witnesses were each cross examined by counsel for each party. The bundles of documents as filed were referred to and accepted as exhibits by the parties herein.
- [3] The court has reviewed the lengthy submissions filed by both counsel in this matter. Reference will be made to those submissions which were considered necessary to explain the court's conclusions. It is to be noted that failure to make specific mention of any point of submission does not mean that it has been ignored or there has been a failure to take it into account. Similarly, several issues and points have been raised by both counsel which in the court's view were redundant to the discussion and resolution of the main issues in the case at bar. It is to be noted also that the court utilised authorities not mentioned by counsel but that were pertinent to the case at bar.
- [4] That facts are that the claimant is the registered owner of a Pathfinder Registration number PD 560. The defendant company is in the business of selling, repairing vehicles and selling vehicle parts.
- [5] On the 12th September 2017 the claimant took her vehicle to the defendant to have the bumper which was damaged to be sprayed. When she went to pick up the vehicle on the 14th September 2017 she was not satisfied with the job done in that the bumper was sprayed in a different colour from the remainder of the vehicle.
- [6] Thereafter the vehicle was left on the business premises of the defendant company on the understanding that it was to be totally resprayed. It is to be noted that in the year before the claimant also took her vehicle to the defendant for the entire vehicle to be sprayed and she chose the colour. It is the claimant's case that at that time the vehicle was not sprayed in the colour that she chose and after the issue with the bumper it then was agreed with the defendant that the entire vehicle would be sprayed in the colour as previously requested by the claimant the year before. The vehicle was left at the defendant's premises for that purpose.

- [7] On Sunday 17th September 2017 a hurricane warning was issued for Dominica and on 18th September 2017 Dominica was hit by Hurricane Maria which caused widespread damage throughout the island including the Cane Field Area where the defendant's garage is located.
- [8] The claimant's vehicle was located on the defendant's premises. It is the defendant's evidence that the vehicle was parked in the centre of its workshop which is elevated and that the defendant made every effort to ensure that claimant's vehicle was kept in a safe place which was dry and secured. The defendant claims that the claimant's vehicle was kept in a place of safety in a place that was dry and secure in an area which did not have a high risk of flooding during heavy rainfall and their decision was based on previous experiences of bad weather in Dominica more particularly after the passage of Tropical Storm Erica a few years before.
- [9] It is the claimant's pleaded case that the defendant was negligent in that the defendant:
- i. Failed to keep the Claimant's vehicle in a safe area during the passage of Hurricane Maria.
 - ii. Failed to maintain it's a garage in a safe area which is not at a high risk of flooding during heavy rainfall.
 - iii. Built and maintained its garage next to a river in an area susceptible to flooding.
 - iv. Negligently failed to build a suitable river defence wall and negligently deposited soil and other material near the river. The deposited material was washed away and onto the Claimant's vehicle during the passage of Hurricane Maria thereby causing damage to the Claimant's vehicle.
 - v. Failed to remove the Claimant's vehicle from their garage after the issue of a hurricane warning on the 17th of September 2017 and prior to the passage of Hurricane Maria during the evening on the 18th September 2017.
 - vi. Through its servants and/or agents used heavy equipment including an excavator and backhoes to push the Claimant's vehicle across the Defendant's yard following the passage of hurricane Maria thereby causing further damage to it.
 - vii. Failed to spray the Claimant's vehicle bumper in a colour identical to the rest of the vehicle as requested. When this error was observed by the Claimant and the Defendant's employee, the Defendant's employee asked the Claimant to leave the vehicle on the Defendant's premises so that the Defendant could remedy this error. Had the Defendant

delivered the Claimant's vehicle in the colour, to her as agreed, the Claimant's vehicle would not have been damaged in the Defendant's garage.

- viii. Failed to purchase an insurance policy which would compensate the Claimant for damage caused to her vehicle while on its premises. Alternatively, the Defendant failed to pay to the Claimant the proceeds of any insurance claim concerning her vehicle. Alternatively, the defendant negligently failed to submit and pursue a claim for compensation for the damage to or loss of the claimant's vehicle while on its premises.

[10] It is the claimant's case that as a result of the defendant's negligence the claimant suffered a financial loss and damages having lost the use of her vehicle for more than three years

[11] It is the defendant's case that they recognised that they had a duty of care and that they took all reasonable precautions by placing the claimant's vehicle in a covered and enclosed area. The defendant admits that damage was done on their premises, but this was caused by the volume of water which was more than the water and mud experienced during Tropical Storm Erica and the damage which was done was done by the water level which caused the river to change its course higher up from their property.

[12] The defendant admits through the evidence of its manager Mr Maldonado that there was damage in excess of the damage caused by Tropical Storm Erica. This witness described the damage as follows that:

" ... The river which is on the Eastern and Northern end of the property brought debris from further up the river. There was an average of 5 feet of mud, trees and other debris including heavy equipment for higher up the river. The volume of water was so intense that caused the vehicle to pile up against each other, some vehicles were buried under mud, under debris and under other vehicles.

The claimant's vehicle was one of the vehicles which was damaged during the passage of Hurricane Maria."¹

¹ Paragraphs 17 and 18 of the witness statement of Hector Maldonado which was admitted as his Evidence in Chief during the trial of this matter.

- [13] The defendant contended in its pleaded case and evidence of its witnesses that everything was done to ensure the safety of the claimant's vehicle and that essentially the amount of the rainfall experienced in the Hurricane exceeded that which was expected or experienced and that the excessive amounts of water, mud and debris was not expected or even experienced before. Further, that the defendant's failure to build a wall as alleged by the claimant did not amount to negligence on their part as based on their previous experience subsequent to the passage of tropical storm Erica there was less than 6 inches of water where the plaintiff's vehicle was parked.
- [14] The defendant further contended that after the passage of Hurricane Maria the situation in its garage was chaotic and the whole area had to be cleared and the debris had to be removed. That the removal of the debris was done in a professional manner and the defendant denies causing further damage to the claimant's vehicle by pushing it with heavy equipment.
- [15] Regarding the damage and loss of her vehicle it is the claimant's submission that the defendant acted negligently and but for their negligence her vehicle would not have been damaged. The claimant contends that the defendant failed to:
- a. Take the necessary steps to remove her vehicle from its premises knowing and being well aware of the damage caused to vehicles on its premises two years earlier consequent to the passage of Tropical Storm Erica and in the circumstances of this case basically ignoring the hurricane warning that was issued;
 - b. Grant the claimant permission to remove her vehicle from its premises and retained the keys to the said vehicle in light of the lien the defendant had on the vehicle;
 - c. Ensure that their garage was properly secured and enclosed in that the area in which the vehicle was kept was secured by a perforated fence rendering it easy for water and mud to penetrate.
- [16] The claimant further claims that the defendant failed and or neglected to make a claim for the loss and or damage of her vehicle even though the defendant was aware of her request for compensation and also in spite of the fact that the company did have a policy of insurance which covered her vehicle. The claimant complains that the defendant made a claim under its policy of

insurance only for itself with no regard for the loss she suffered at the defendant's hands. The claimant submits that this was a further act of negligence on the part of the defendant.

The Issues:

- [17] Was the defendant responsible for the destruction of the claimant's vehicle and consequential losses suffered therefrom by reason of their negligence in that they failed to properly store the vehicle or call the claimant to come for her vehicle in the face of a threatened hurricane?
- [18] Whether the defendant is liable for the loss suffered by the claimant as a result of its failure to or refusal to claim compensation for the claimant's vehicle under its policy of insurance.

Negligence

- [19] It is well established law that negligence is established where the claimant proves on a balance of probabilities that the defendant has breached his duty of care to the claimant which resulted in damage and loss by the claimant. In **Blyth -v- Birmingham Waterworks Co**². Alderson B said:
"Negligence is defined as the omission to do something which a reasonable man guided upon those circumstances which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do"³
- [20] The onus of proof is on the claimant to establish on a balance of probabilities that the loss or damage which occurred was as a result of negligence on the part of the defendant. **There is no dispute that the claimant's vehicle was in the custody of the defendant on the 18th September 2017 when it was damaged.** (Emphasis mine)
- [21] The essential elements of the tort of negligence are well established:
 - a. The existence of a duty of care;
 - b. The failure to achieve that standard of care prescribed by law resulting in the breach of such duty; and
 - c. Damage .(which is not too remote)

² (1856) 11 EX 781

³ Ibid at page 784

[22] Liability for negligence is said to have a wide scope and therefore it is incumbent upon the court to examine the duty of care which may arise in instances where negligence is alleged.

[23] It is trite law that a defendant must owe a duty of care to a person claiming negligence. It is necessary for a claimant to prove that the defendant's wrongdoing was a cause although not necessarily the sole or dominant cause of the injury or damage caused to the claimant.

[24] When considering breach of duty of care, the consideration is to be given to whether the damage is foreseeable, whether there is a connection described as causal connection or relationship proximity between the parties and whether it is fair just and reasonable to impose the duty of care. **Re: Donoghue -v- Stevenson**⁴.

[25] In **Donoghue -v- Stevenson** Lord Atkin had this to say:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question, who is your neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which can reasonably foresee would likely to injure your neighbour. Who, then is my neighbour? The answer seems to be person who are so closely and directly affected by my act that I reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."⁵

[26] The English author Milner in his work *Negligence in Modern Law* (1967) stated that:

"The duty concept in negligence operates at two levels. At one level it is fact-based, at another it is policy-based. The fact-based duty of care forms part of the enquiry whether the defendant's behaviour was negligent in the circumstances. The whole enquiry is governed by the foreseeability test, and "*duty of care*" in this sense is a convenient but dispensable concept. On the other hand, the policy-based or national duty of care is an organic part of the tort; it is basic to the development and growth of negligence and determines its scope, that is to say, the range of relationships and interests protected by it. Here is a concept entirely divorced from foreseeability and governed by the policy of the law. "*Duty*" in this sense is logically antecedent to "*duty*" in the fact-determined sense. Until the law acknowledges that a particular interest or relationship is capable in principle of

⁴ [1932] AC 562

⁵ Ibid at page 580

supporting a negligence claim, enquiries as to what was reasonably foreseeable are premature.”

- [27] The enquiry into the existence of a legal duty is discreet from the enquiry into negligence. Nor can the mere allegation in the particulars of claim that Council was under a legal duty to take steps to prevent loss being caused to plaintiff carry the day for him. The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case. The general nature of the enquiry as stated in the well-known passage in Fleming The Law of Torts 4th ed at 136:

“In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff’s invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjust in the light of the constant shifts and changes in community attitudes.”

The enquiry encompasses the application of the general criterion of reasonableness, having regard to the legal convictions of the community as assessed by the Court.

- [28] In the case at bar, this court is of the view that the question of proximity or duty of care is not in doubt as the defendant does not deny that the claimant was its customer or that the claimant’s jeep was in their garage being worked on.
- [29] The defendant says that in the face of the hurricane warning the claimant’s vehicle was moved to the middle of the garage (workshop) where it was felt it would be least likely to be damaged. The defendant claims that they were relying on their previous experience after the passage of Tropical Storm Erica.⁶ The evidence of Ms George on behalf of the defendant was that there were only six inches of water in that area of the defendant’s premises after the Tropical Storm. This was denied by the claimant’s witness who says that after Tropical Storm Erica, he saw that vehicles and equipment in the garage were moved around by the force of water, he also said that there was about six inches of water in the garage.

⁶ Evidence of Rhoda George

- [30] The defendant contends that they took the best possible care of the vehicles on its property. This was challenged by the claimant who contended that in light of the defendant's experience from the passage of Tropical Storm Erica in 2015, the location of the defendant's garage and the damage that was caused to the vehicles on the defendant's premises that it was foreseeable that similar or more damage would have been caused during a hurricane and that the likelihood of damage was so high that precaution to better secure her vehicle should have been taken.
- [31] It is well established and trite law that it is for a claimant to allege and prove the defendant's negligence. The onus is on a claimant to establish that a reasonable person in the position of the defendant:
- (a) Would foresee the reasonable possibility that the conduct (whether an act or omission) would injure another person's property and cause that person's proprietary loss;
 - (b) would take reasonable steps to guard against such occurrence; and
 - (c) that the defendant failed to take such reasonable steps.
- [32] The claimant in her evidence in chief as contained in the Witness Summary filed on her behalf said, she knew that of the destruction of the premises was foreseeable as the defendant's premises as all the vehicles were similarly damaged during the passage of Tropical Storm Erica.
- [33] When pressed under cross-examination about her statement and knowledge regarding the damage to vehicles on the defendant's premises after the passage of Tropical Storm Erica it turned out that the claimant had no firsthand knowledge of this, she said that she heard there were vehicles damaged. That the claimant was unable to name any one person whose vehicle was damaged. She told this court "*she heard them saying a lot of vehicles were damaged*".
- [34] What the claimant told this court under cross-examination was that after the hurricane when people were talking, the talk was that a lot of vehicles got damaged, so after the passage of Hurricane Maria they brought up the talk about the damage after Tropical Storm Erica. What this court understands the claimant to be saying is that after Hurricane Maria she was speaking to different

people and it was brought up in those conversation that people spoke of what happened after Tropical Storm Erica and opined that the defendant should have taken precautions. This court attaches little weight to this evidence.

[35] Similarly, it is pellucidly clear that Mr Maldonado one of the witnesses for the defence had no personal knowledge of what happened at or on the defendant's premises post Tropical Storm Erica.

[36] Rhoda George the garage supervisor said that based on her experience with Tropical Storm Erica the centre of the workshop was where got the least water in the storm. She said that the vehicles that were in the workshop during the passage of Tropical Storm were exposed to water and that these vehicles were cleaned up and returned to the customers in working order.

[37] When pressed under vigorous cross examination by Mrs Shillingford Marsh, this witness told the court that the water that was in the garage entered there to the level where your feet would be in the vehicle but they did not have water to the level that would have been in the engine of the vehicles. This witness also told this court under cross-examination that on the Sunday after the Hurricane warning was issued that vehicles including the claimant's vehicle were moved into the workshop and when asked by counsel Shillingford Marsh if this was the safest place to move the vehicles the witness responded 'Yes based on previous experience, inside the workshop would have been the safest place'.

[38] In further response to Counsel Shillingford Marsh's suggestion that it was unreasonable for the claimant's vehicle to be left in an area that was exposed to water and area that was enclosed by fencing (permeable fencing) this witness said that it was felt that they took the necessary steps to secure the customers' vehicles.

[39] Counsel further suggested that it was foreseeable that water would enter the workshop during the hurricane. The witness answered yes that is why steps were taken to secure the vehicle at 7:00 PM in the evening. This witness went on to tell the court when pressed by Counsel for the claimant that there was no way that we could have known the extent or damage that would occur.

- [40] Having carefully observed this witness while she gave her evidence this court found her to be an honest and credible witness. Her demeanor during her evidence and whilst she was under thorough, rigorous and piercing cross examination this court was of the impression that she was being frank and honest and this court accepts her evidence regarding the decision made to put the claimant's vehicle in the garage/workshop that is was at the time a decision based on previous experiences from Tropical storm Erica.
- [41] This court also heard from Mr Marshall Alexander the Senior Meteorological officer who heads the Dominica Meteorological Service. Mr Alexander confirmed that he was involved in the compilation of the meteorological reports which were compiled after the passages of Tropical Storm Erica and Hurricane Maria which reports were attached to his Witness Summary and marked "A" and "B" and admitted into evidence.
- [42] This witness told this court that there are officers from the Dominica Meteorological Service who would go to the various rivers and see how they were affected by the passage of the storms and they would do measurements. Mr Alexander during cross examination from Mrs Shillingford Marsh said he was not aware of the Canefield River bursting its banks after Tropical Storm Erica.
- [43] Mr Alexander also confirmed to the court that there was a Hurricane Warning issued for Hurricane Maria and that his office did send out a warning about expected excessive rainfall and that persons in areas prone to flooding should exercise care.
- [44] Counsel on behalf of the claimant in her cross examination of the witness asked him " *By areas prone to flooding it meant that, would that include areas in close proximity to rivers?*" His answer was that some areas close to rivers were prone to flooding." It is noted by this court that the witness was very careful and clear in his answer to counsel's question that some areas close to rivers were prone to flooding. (Emphasis mine)
- [45] It is now well established that, whether in any particular case, the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depends on a consideration of all

the relevant circumstances. As stated above, the 2015 Tropical Storm caused wide-spread devastation. In the absence of any reliable data in relation to the nature and intensity of the storm in respect of 2015, it is difficult to see how the respondent could discharge the onus. The obvious questions that arise are, what in these unknown circumstances could reasonably be foreseen and what reasonable steps could have been taken to prevent the flooding. These questions were not addressed by counsel for the claimant or the defence.

[46] The claimant not only made a claim in negligence but also claimed that she “*The Claimant agreed to pay the Defendant for its services and left her Nissan Pathfinder PD560 with the Defendant as the bailee.*”⁷ The question of bailment therefore arises. Counsel for the claimant cited and relied on the case of **Morris -v- CW Motors & Sons**⁸ where Denning LJ examined the law regarding bailment for reward and he said:

“Once a man has taken charge of goods as a bailee for reward, it is his duty to take reasonable care to keep them safe: and he cannot escape that duty by delegating it to his servant. If the goods are lost or damaged, whilst they are in his possession, he is liable unless he can show - and the burden is on him to show - that the loss or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty. ... The bailee, to excuse himself, must show that the loss was without any fault on his part or on the part of his servants.”⁹

[47] In **Rosental vs. Alderton and Sons Ltd**¹⁰ Evershed, J stated:

‘To constitute a bailment chattels must be delivered in trust, on a contract, express or implied, that the trust shall be duly executed, and the chattels re-delivered as soon as the time or use for, or conditions on, which they were bailed shall have elapsed or been performed. Delivery means the transfer of the actual or constructive possession of the chattel by the bailor to the bailee.

[48] Chitty on Contract¹¹ discusses the duty of care of a bailee as follows:

“... The bailee must take reasonable care of the chattel according to the circumstances of the particular case.

...

⁷ Paragraph 4 of the claimant’s re amended statement of claim

⁸ [1966] 1 QB 716

⁹ Ibid at page 726

¹⁰ Ltd [1946] 1 ALL. E.R. 582 at 583

¹¹ 26th Edition at Paragraph 2656

And at paragraph 2671 he states:

.....loss or injury to the chattel while in the bailee's possession places the onus of proof on the bailee to show that it was not caused by any failure on his part to take reasonable care".

[49] In law bailment arises whenever a person is voluntarily in possession and control of goods belonging to another. Where there is bailment, there is the legal imposition of an obligation because of the taking of possession in the circumstances. This involves an assumption of responsibility for the safe keeping of the goods. **Re: Halsbury Laws of England, Bailment and Pledge**¹²

[50] Where a bailee is negligent he will not be able to seek exemption of his responsibility for losses due to his negligence by relying on special conditions in his contract unless the words used in the contract are clear and adequate for the purpose. **Re: Canada Steamship Lines Ltd -v- R**¹³

[51] The burden is on the bailee to prove that the loss or damage of the chattel occurred without any neglect, default or misconduct on his part or on the part of any of his employees to whom he may have entrusted any part of his duty of care. **Re: 2 Entertain Video Ltd and other -v- Sony DADC Europe Ltd**¹⁴. In other words where a chattel is entrusted to a custodian and it is destroyed the onus of proof is on the custodian to show that the damage did not happen in consequence of any neglect on his part or that of his employees acting within the course of their employment.

[52] Counsel Shillingford Marsh cited and relied on the case of **Codman -v- Hill**¹⁵ in this case a bailee of cattle let them escape and be lost, this was without negligence on his part. It was held that he was blameless in detinue but negligent in that he had failed to inform the owner of the loss as soon as possible, a duty which the court found to arise out of the contract of agistment. The word agistment arises where a person called the agister takes another person's cattle to graze on his land for reward. It is in nature a contract of bailment.

[53] Scrutton LJ said

¹² Volume 4 (2020) Re: K H Enterprises -v- Pioneer, The Pioneer Container [1994] 2 AC 324

¹³ [1952] AC 192 @ 207 -208

¹⁴ [2021] 1 ALL E R 527

¹⁵ [1918-1919] All E R Rep.

“that a bailee must show that the goods were lost without default on his part. If the property is stolen, and he does not promptly after discovery of the theft notify the bailor or the police of that fact, the burden lies on him of proving that prompt notification to the bailor or to the police would not have led to the recovery of the goods undamaged. The owner of land on which stocks are agisted is the bailee and has possession of the cattle and must take reasonable and proper care of the stock. A contract of agistment is a contract under which an agister agrees, for payment, to provide grazing for, and to supervise and look after, the owner’s stock on land that the agister owns or occupies.”

- [54] Where there is a bailment as in the case at bar the defendant as bailee was obliged to return the vehicle to the claimant upon fulfillment of the purpose of the bailment, that is after the spray job was completed. The defendant was obligated to take reasonable care of the vehicle whilst it was in its possession, that is as much care as an ordinarily prudent person would take. In **Coldman - v- Hill**¹⁶ as quoted and relied on by counsel for the claimant the court observed that if the bailee goods are lost or stolen the burden lies on the bailee to prove that he had made all reasonable efforts to ensure the return of the goods or else he would be held liable in negligence. It is noted that the obligation to exercise a reasonable care by the bailee is intrinsic in every contract of bailment. The bailee is required to exercise a degree of care under the existing circumstances towards safe guarding the items entrusted to his care which might be expected of a reasonable prudent person responsible for the safety of the goods.
- [55] On the question of bailment the test is that when a chattel is entrusted to a bailee and he parts with it and is thereby lost, the onus of proof is on the bailee to show that the loss of the chattel did not happen as a consequence of his neglect to use reasonable care and diligence.
- [56] The question therefore arises did the defendant as the bailee exercise such care in the circumstances of the present case?
- [57] In bailment cases the claimant has the burden of proving that a loss was caused by the defendant’s failure to exercise due care. Once a prima facie case is established by showing that

¹⁶ Ibid

the claimant delivered the item to the defendant and that the defendant did not return the good(s) to the claimant at this point a presumption of negligence arises and it is incumbent upon the defendant to rebut that presumption that he/she was not negligent.

[58] There is no dispute that the claimant's vehicle with in the possession of the defendants and suffered damage in the hurricane and that the vehicle was never returned to the claimant in working condition.

[59] It is also true and not disputed that on the 18th September 2017, Dominica was pounded by a category 5 hurricane named Maria which caused extensive and catastrophic damage across the island. This court takes judicial notice¹⁷ of the public information and experience that the damage caused by Hurricane Maria was more extensive and catastrophic than the damage caused by Tropical Storm Erica. Further, that the devastation caused by Tropical Storm Erica was more or less restricted to a specific part of the island (not necessarily in the area of Canefield) but in the areas such as Rosalie, Delices, Petit Savanne and generally the Southern area of Dominica.

[60] The question to be considered and decided on firstly is whether or not the defendant by placing the vehicle in the centre of its workshop along with other of its own vehicles amounted to the necessary care as is required by a bailee in law. It is the claimant's case that the defendant did not, and it is the defendants case that they are not liable for the damage because they had taken reasonable care as was anticipated in the circumstances.

[61] Now what was the evidence adduced by the defendant to show that their actions was that of a reasonable person to take care of the claimant's property as he would have taken of his own property under similar circumstances.

¹⁷ The doctrine of judicial notice enables a court or judge to establish and act upon certain facts, or to regard certain facts as clear and beyond dispute, without requiring those facts to be proved by evidence from the parties in the normal way **Halsbury's Laws of England Vol 48 at paragraph 466 "The nature of Judicial Notice":**. Also **Re: Dr Martin Didier and Other -v- Royal Caribbean Cruises Ltd, SLUHCVP2017/0051** It was held that the principle is to be used to prove notorious facts, and not important factual issues within the peculiar knowledge of one of the parties

- [62] The evidence adduced by the defendant is that the claimant's vehicle was secured in the same manner as the other vehicles owned by the defendant and that those vehicles were also damaged. Further it is the defendant's case that they did not expect the magnitude of the destruction and damage that was experienced and sustained.
- [63] The defendant's witness Mr Maldonado told this court that Hurricane Maria was predicted to be a category 2 hurricane which struck the island as a category 5 hurricane. Mr Maldonado who was the manager of the defendant company at the time in his evidence in chief said that the actions taken to secure the vehicles was based on the information received from the Hurricane Centre and the Meteorological Services. This court can also take judicial notice of the fact that it was generally known and accepted on Dominica that Hurricane Maria was much worse than anticipated and forecasted.
- [64] Mr Maldonado told this court that it was ensured that the claimant's vehicle was kept in what was considered a safe place which was dry and secure which area did not have a high level of flooding during rainfall.
- [65] Mr Maldonado's evidence is that the river which was on the eastern and northern end of the defendant's property brought debris down from higher up the river which included mud, trees and other debris including heavy equipment which was carried onto the defendant's property and channeled through the repair shop. This witness also said that the volume of water was so intense that this caused the vehicles to pile up against each other burying some vehicles under the mud, debris and other vehicles.
- [66] This witness also said that the claimant's vehicle was one of the vehicles that were damaged. In amplifying his evidence as contained in his witness statement Mr Maldonado said when he arrived on the defendant's premises after the Hurricane the amount of devastation he found on the property was unimaginable.
- [67] Under cross examination by counsel for the claimant this witness agreed with counsel's suggestion that Dominica expected to receive a high level of rainfall and that there would be flooding. He

however, did not agree with counsel's suggestion that there was an excessive amount of water after Tropical Storm Erica.

[68] In her closing submissions Counsel Shillingford Marsh submitted that the claimant gave evidence which showed that the defendant did not keep her vehicle in a safe place. Counsel contended that the defendant's premises adjoins the river with a permeable fence and that in the circumstances it was foreseeable that the river would have flooded due to the damage sustained previously in Tropical Storm Erica.

[69] It is noted to this court's mind, that the claimant did not prove on a balance of probabilities that there was catastrophic or serious flooding and damage after Tropical Storm Erica in the area of or on the defendant's premises.

[70] Rhoda George under cross examination said that after the passage of Tropical Storm Erica water entered the workshop and the vehicles in the workshop were exposed to water, however, she said the water damage was on the floor of some vehicles which were cleaned and returned to their owners, the customers in working condition. This would not be catastrophic damage particularly compared to the aftermath of Hurricane Maria.

[71] Counsel Shillingford Marsh asked this witness "*Do you mean that inside the vehicles where your feet would be, water entered there?*" The witness responded "Yes". Counsel asked "*What about water in the engine?*" Ms. Greene responded that "*we did not have that level of water in vehicles*".

[72] This court on a review of the evidence taken was that Ms George did not admit that the vehicles were damaged after Tropical Storm Erica as inferred by Counsel Shillingford Marsh in her closing submissions.

[73] Counsel Shillingford Marsh in her closing submissions directed the court's attention to the weather forecast for Dominica Meteorological Service¹⁸ and the warning that "*Persons in areas prone to flooding, landslides and falling rocks are advised to be extremely vigilant and to exercise extreme*

¹⁸ Bundle 3 at Page 76 & 78.

caution as life threatening flooding is possible.” Counsel’s submission in this regard was that on the face of this warning that the defendant by placing the claimant’s vehicle in the workshop was in wanton disregard for the safety of the said vehicle.

[74] Counsel Shillingford Marsh in her detailed submissions on the tort of negligence submitted extracts from the relevant aspects of law of negligence seeking to show that the defendant is liable in negligence, counsel cited, examined and relied on the following cases which she submitted were of similar facts to the case at bar:

- a. **International Ltd -v- Magnet Bowling Ltd** ¹⁹ in this case consequent to an exceptionally heavy rain storm water entered the building in which the plaintiff had wood stored which was seriously damaged by the water which flooded the building. The defendants who were occupiers of the building were found liable under statute for failing to take reasonable care in regard to temporary precautions against flooding the defendants were also found liable in negligence.
- b. **Brabant & Co -v- King**²⁰ where Where the Government, being bailees for hire, stored the appellants' explosive goods in sheds near to the water-edge:- It was held *inter alia* that the selection of such a site rendered it incumbent upon them to place the goods at such a level as would in all probability ensure their absolute immunity from the incursion of flood water; that the appellants were entitled to rely on the care and skill of their bailees, and could not be said to have accepted any risks of defective storage with which they had made themselves acquainted.

[75] Counsel Blomqvist Williams submitted that the damage that occurred in Hurricane Maria was not foreseeable. Counsel pointed the court to evidence given by Sean Astaphan the claimant’s son when he said under cross examination that the *“Hurricane was not foreseeable by anyone”*.

[76] Counsel on behalf of the defendant submitted that the amount of water deposited on Dominica during Hurricane Maria was unprecedented and unexpected and unforeseeable. Counsel made

¹⁹ [1968] 2 ALL E R 789, [1978] 1 WLR 1029

²⁰ [1895] AC 632, 64 LJPC 161

reference to the evidence adduced by Mr Alexander the meteorological office. Counsel also pointed out to the court that this was the first time that the defendant's property experienced such a deluge.

[77] This court understands counsel for the claimant to be saying that the defendant as a bailee ought to be held liable in negligence for failing to take adequate steps to protect her client's vehicle from damage sustained in Hurricane Maria particularly in light of the defendant's experience in Tropical Storm Erica. That the excessive damage as a result of the Canefield River bursting its banks and depositing mud, water and debris on its property was foreseeable and precautions ought to have been taken to prevent the claimant's property from sustaining the damage that it did.

[78] The defendant has not denied that the claimant's vehicle was damaged but maintain that they took every possible precaution to protect property on their premises however, the damage sustained was not reasonably foreseeable, even after their experience in Tropical Storm Erica where flooding was minimal and no damage along the lines of that experienced from the passage of Hurricane Maria.

[79] The defendant also contend that the damage and chaos post Hurricane Maria was unprecedented and unforeseen.

[80] Counsel Shillingford Marsh referred the court to a number of cases in support of her claim for negligence including the case of **Blythe -v- Birmingham Water Works Co.**²¹ which was cited and relied on in setting out the definition of "negligence" and the test for whether there has been a breach of duty. It is instructive to consider the facts of this case as they are applicable to the case at bar regarding the exercise of duty of care in situation of extreme weather conditions and whether negligence can be attributed to the defendant in such circumstances.

[81] In that case there was a situation of extreme and severe winter weather such as could not have been foreseen and ultimately it was held that the fact that precautions taken proved to be insufficient against such unforeseeable coldness was not sufficient to render the water company

²¹ (1843-1860) All E R 478

liable in negligence. It was held therefore that in the absence of negligence the defendant could not be held responsible for the escape of water which caused the claimant's damage.

[82] In this case the evidence showed that the defendant took precautions against the expected cold weather and that due to a particularly unforeseeable cold winter the damage occurred, and the court decided that the damage could not be as a result of negligence.

[83] Alderson B in his judgment stated “

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to the average circumstances of the temperature in ordinary years. The defendants had provided against such frosts as experience would have led men, acting prudently, to provide against; and they are not guilty of negligence, because their precautions proved insufficient against the effects of the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the polar regions. Such a state of circumstances constitutes a contingency against which no reasonable man can provide. The result was an accident, for which the defendants cannot be held liable...”

[84] Anyone who takes custody of someone else's property is legally liable for loss or damage to the property due to negligence. The basic rule is that the bailee is expected to return to its owner the bailed chattel when the bailee's time for possession of them is over, and the bailee is presumed liable if the chattel is not returned. The bailee has a responsibility to the bailor to maintain the property in a safe condition. A bailee is not responsible for the loss, destruction or deterioration of the bailed chattel, where the bailee takes such care as a person of ordinary prudence would under similar circumstances take of his or her own chattel of the same bulk, quantity and value, as the bailed chattel. The bailee needs to take the same degree of care of the chattel whether the bailment is for reward or gratuitous.

[85] At least so far as modern commercial bailments are concerned the absence of reward is likely to be largely, if not wholly, immaterial to the standard of care expected of the bailee Re: **Port**

Swettenham Authority v. T.W. Wu & Co^{22,23} The responsibility is one of "ordinary care" or the care that prudent persons would exercise in caring for their own property. The circumstances of the bailment and the nature of the property usually will be deciding factors as to the degree of care a bailee must exercise.

- [86] The bailee is under a duty to anticipate the hazards to which the particular property would be exposed. Hence, a bailee is liable to a bailor for property that is lost or stolen from the bailee's premises while under the care of a bailee, even if the loss was not the bailee's fault. In a bailment case, the bailor has the burden of proving that a loss was caused by the bailee's failure to exercise due care. Because the bailee is in possession and in control of the given property, the bailor makes out a make a prima facie case for negligence if the property is not returned or returned in a damaged condition.
- [87] In assessing the duty of care the court ought to look at the foresight of harm and what is practicable. There must be an element of realism about risks and foresight of harm. In the case at bar the court finds that Mrs Shillingford Marsh's submissions regarding the perforated fence, the proximity of the defendant's property to the Canefield River and the previous experience in Tropical Storm Erica to be attractive in terms of what actions the defendant could have taken in terms of protecting the vehicles on their property. However, one has to be realistic and note that the evidence before the court is reality that the catastrophic experience and damage were unprecedented and unexpected.
- [88] The hurricane warning which was issued was far below the level of Hurricane actually experienced. In making the assessment of the obligation to act and whether the care taken by the defendant was reasonable in the circumstances, the dicta of Alderson B is instructive. This court considers that based on their previous experiences and the meteorological forecast the defendant took adequate actions to protect the claimant's vehicle and cannot realistically be held to be liable in negligence as claimed.

²² . [1979] A.C. 580

²³ This case was not cited by counsel but the court found the decision to be useful in considering the case at bar

[89] This court finds that the defendant through its servants and agents acted prudently in so far as placing the vehicle where they did, and this is, taking into consideration also previous experience and their realistic expectation of what was to come. Reference is made to **Liverpool Grain Storage and Transit CO Ltd -v- Charlton and Bagshaw** ²⁴ where it was held that if a bailee provides a reasonably fit place for storing the chattels he is not responsible if the place proves defective under exceptional and unlooked stress.²⁵

Further damage to vehicle after passage of hurricane.

[90] The claimant further makes a claim that after the passage of the hurricane the defendant caused further damage to her vehicle by moving it with an excavator by pushing the vehicle across their yard.

[91] The defendant in response regarding this aspect of the claimant's claim, stated that the defendant took reasonable care of the claimant's vehicle and that the defendant exercised the standard of care demanded by the circumstances. The defendant made no specific denial of the claimant's claim regarding the removal of the claimant's vehicle in their defence.

[92] Counsel for the claimant in her submissions²⁶ made reference to the evidence of Mr Maldonado when he said that "the defendant used a crane, excavator and skid steer in mud removal" in support of her submission, that this obviously caused further damage to the claimant's vehicle. Mr Maldonado's exact words in cross examination was "Once we cleared the mud and reached the claimant's vehicle, we would carry it to the adjacent lot using a crane and skid steering." This witness went on to tell this court that the claimant's vehicle was still in the adjacent lot on the northern side of the compound. It is therefore clear to this court that the claimant's vehicle was clearly never fixed and returned to her. It is also clear based on the testimony of the defendant's

²⁴ (1918) 146 LT Jo 20 HL .

²⁵ This case was not quoted by counsel but came to the court's attention in its general review and law and was referred to in Halsbury's Laws of England Volume 4 (2020) at paragraph 146 where the discussion was focused on the Bailee's obligations and care and negligence.

²⁶ See paragraph 10(5) of claimant's closing submissions

witness Mr. Maldonado, that the claimant's keys were never returned to her. Therefore it is noted that custody and possession of the vehicle was never returned to the claimant.

Insurance issue:

[93] The claimant also made a claim premised on the ground that where the custodian of a chattel entrusted to his care was destroyed or damaged filed to recover the insurance money the custodian is obligated to pay the owner of the chattel that the custodian would have been entitled to under the insurance policy.

[94] The claimant further claims against the defendant that after the passage of Hurricane Maria the defendant used an excavator to push her vehicle across their yard thereby causing further damage to her vehicle. Sean Astaphan in his witness statement spoke to seeing this first hand and took pictures which were exhibited to his witness statement and in the trial bundle, number 3, showing what appears to be the white pathfinder in a pile of damaged vehicles.

[95] The defendant in response regarding this aspect of the claimant's claim, maintains that the defendant took reasonable care of the claimant's vehicle and that the defendant exercised the standard of care demanded by the circumstances. The defendant made no specific denial of the claimant's claim regarding the removal of her vehicle after the hurricane. In fact the manner of removal of the vehicle from the work shop was confirmed in the claimant's evidence by Mr. Maldonado who told this court that *"once they cleared the mud and reached the claimant's vehicle we would carry it to the adjacent lot using a crane and skid steering"*. This witness told the court that the vehicle is still in the adjacent lot on the northern side of the compound.

[96] Mr Maldonado confirmed that the keys for the vehicle were also not returned to the claimant. To this court's mind the bailment on the part of the defendant continued as the vehicle was never returned to the claimant. Therefore the defendant continued to be a bailee of the claimant's vehicle to which a duty of care attaches. It is well established if not trite law that possession is a crucial element of bailment and the claimant's vehicle for all intents and purposes is still in the defendant's possession.

- [97] There is no evidence before this court that any steps have been taken by the defendant to restore and return the vehicle to the claimant. It is clear from the statements of case and the evidence adduced at trial and the submissions made, that without a doubt that the defendant is in possession of the vehicle pursuant to a contract of bailment.
- [98] This court understands from counsel for the claimant's submissions as a whole that is taking into consideration the varied and many points made, that her argument is based on all the evidence that the inescapable conclusion is that the defendant failed in its overall obligation as a bailee to take care of its client's vehicle so that it would not have been damaged causing her client to suffer consequential loss.
- [99] The defendant on the other hand denies all liability in negligence and contends that the damage suffered by the claimant was caused not by the defendant's negligence as a bailee but by an act of God.
- [100] The evidence that has thus far been adduced to this court clearly points to the fact that there was the necessary transfer of possession for the claimant to the defendant to constitute bailment. It is clear that the vehicle sustained damage whilst it was in the possession of the defendant. However, the court has taken note of the passage of Hurricane Maria and the catastrophic damage sustained at the defendant's premises and indeed throughout the island of Dominica.
- [101] This court has found as stated aforesaid that it finds that the defendant in placing the vehicle in its garage along with other vehicles which were also damaged as a result of the unexpected flood and mud with debris were not reasonably foreseeable.
- [102] From the evidence adduced it is also pellucid to the court that the defendant made a claim on their insurance policy for many items lost and damaged on their premises.
- [103] Part of the claim presented by the claimant is that the defendant failed to purchase and or claim on an insurance policy which would have compensated her for the damage caused to her vehicle

whilst it was in their possession.²⁷ Further or in the alternative is that the defendant negligently failed to submit or pursue a claim for compensation for the damage or for loss of her vehicle whilst it was on their premises causing her to suffer a financial loss and damages due to the loss of the use of her vehicle.

- [104] It has been established in the evidence adduced to and accepted by this court that after the passage of the hurricane and in the clean up exercises conducted by the defendant, the claimant's vehicle was removed by the use of a crane, excavator and that the date of trial that is January 2022 the claimant's damaged vehicle sits on a lot adjacent to the garage.
- [105] Most certainly, the vehicle has not been repaired, restored or returned to the claimant. This is the evidence regarding claimant's claim regarding the insurance.
- [106] In her evidence the claimant contended she was aware that the defendant's premises were insured which said insurance covered all the content on its premises which included her vehicle which was on the premises. The claimant stated in her evidence that after reviewing the documents disclosed by the defendants in her case, she knew of the existence of the insurance policy and that the defendant has not compensated her for the loss and damage to her vehicle as covered by the insurance policy.
- [107] The claimant contends that the defendant had a duty to insure its garage and its contents to claim on the insurance and to pay over to vehicle owners including herself proceeds of the insurance.
- [108] The claimant in her evidence before this court has said that despite making a claim on its insurance the defendant has failed to compensate her for her vehicle. Mrs. Astaphan told this court that she contacted the owner of the defendant company and told him what happened to her vehicle and explained to him that her vehicle was on the premises of Auto Trade only because of an error made on a paint job made by his employees.

²⁷ Re: Reamended statement of claim at paragraph 7 items: (viii), (ix) and (x)

- [109] This court pauses to say that, the fact that the vehicle was on the defendant's premises was to correct a previous paint job carried out by the defendant was not denied and is not in issue. Put another way it has been accepted by this court that the reason the claimant's vehicle was on the defendant's premises was for it to be spray painted as a result of previous errors on the part of the defendant's employees in the spray painting of the vehicle and the purpose of the claimant's vehicle being in the garage was to be resprayed and to correct the previous job done, to comply with the claimant's previous specific instructions.
- [110] The claimant's evidence was that she was aware of the existence of an insurance policy that claims were made on and payments received. Under cross examination she was shown the list of claims made and that her car was not listed. Counsel Blomqvist Williams put the defendant's case to the claimant in this regard that the defendant sells used vehicles and the vehicles which were claimed were those used vehicles that was on the defendant's premises.
- [111] Mrs. Astaphan said she was not aware that the defendant company sold used cars but agreed that the damaged list of used vehicles were vehicles used by the defendant company and were on the premises.
- [112] Counsel Blomqvist Williams on behalf of the defendant also put to the defendant that all the vehicles for which claims were made belonged to the defendant company and the witness said she did not know.
- [113] Other evidence regarding the insurance claim made by Autotrade came from Mr. Maldonado under cross-examination by counsel for the claimant Mrs Shillingford Marsh. A copy of the insurance policy held by the defendant was duly disclosed and exhibited. A copy of the General Claims Report from NAGICO the insurance company, dated 18th September 2017 was also duly disclosed by the defendants.
- [114] Counsel Shillingford Marsh directed Mr Maldonado's attention to a subparagraph 1 of the defendant's "Commercial "All Risk" Policy" - "Material Damage" section of the policy and to section 1 of the policy which made provision for coverage. Section 1 provides that

“We will pay for the direct ‘physical loss for damage’ or damage to covered property at the premises described in the schedule caused by or resulting from any even not specifically excluded or limited by the terms, conditions, clauses, warranties of the policy ...

Personal property of others that is:

- (i) In your care custody or control; and
- (ii) Located in or in the building in or in the building described in the schedule.

However, our payment for loss or damage to personal property or others will only be for their account,”

[115] Counsel in cross examining Mr Maldonado asked the following questions:

- “Would you agree that the claimant’s vehicle was in the care and custody of the defendant at Maria? (Answer) Yes
 - Would you agree that the claimant’s vehicle was located in the property described in the schedule that is Autotrade’s building? (Answer) Yes I would agree
 - Re: “personal property of other at page 2 – would you agree that under this policy compensation to the vehicles of your customers would not have been paid to Autotrade but to the benefit of the owners of the property? (Answer) I agree
 - Re: the Schedule of the policy in this schedule attached to the policy which shows the different details concerning the insurance correct? (Answer) Yes
 - For the property at canefield in the location section is it correct that there are five items distinguished in the schedule and that under item number 2 and number 3 the total sum insured for the canefield location was \$12,850.000.00? (Answer) That is correct
 - Now is it correct that the claim that was submitted by Autotrade did not include the claimant’s vehicle? (Answer) That is correct our claim to our insurer did not include the claimant’s vehicle.
- Re: The claim: Item 5 of bundle filed on the 17th November 2021
- Would you agree that this document at item 5 is actually a copy of the claim submitted on policy number DAR01261/16 – the All risk insurance policy? (Answer) Yes I would agree”

[116] Mr Maldonado was unable to give a cogent and proper reason why a claim was not made for the claimant’s vehicle under the policy of insurance he however agreed that Autotrade the defendant, could have claimed compensation for the damage and or loss of the claimant’s vehicle.

[117] Counsel Shillingford Marsh on behalf of the claimant made the following submission regarding the defendant’s failure to make an insurance claim that the defendant is to be held liable on the ground

that where the custodian of a chattel entrusted to his care was destroyed or damaged and the custodian failed to recover from the insurance due to his negligence or dilatoriness in pursuing a claim against the insurers, the custodian was obliged to indemnify the owner of the chattel for the sum the custodian would have been entitled to under the insurance policy.

[118] Counsel cited and relied on the following authorities in support of her submission:

- a. **Mensah v National Savings and Credit Bank [1990] LRC (Comm) 402** where the Supreme Court of Ghana held “where the custodian of a chattel entrusted to his care which was destroyed or damaged failed to recover the insurance money by his negligence or dilatoriness in pursuing a claim against the insurers, the custodian was obliged to indemnify the owner of the chattel for the sum the custodian would have been entitled to under the insurance policy.”
- b. **Halsbury’s Laws of England 4th Edition Vol 25** at paragraph 698 “There are many different classes of commercial activity in which, from the point of view of the law, one person becomes a bailee of goods belonging to another... One feature of the position under the common law of such a bailee is that he commonly has a lien for his charges or expenses, and by virtue of this lien he is accepted as having an insurable interest in the goods bailed, not merely to the extent of his charges or expenses as at any given date, but up to the full value of the goods. Furthermore, even if he has no lien, he has an insurable interest founded upon the commission, profit or other advantages which he may expect to derive from the bailment, and in the case also he is entitled to insure up to the full value provided there is evidence to indicate that his intention was to cover, on behalf of the owner, the owner’s interest over and above his own limited interest.”
- c. **Bird’s Modern Insurance Law 8th Edition** by John Birds at page 68 paragraph 4.2:

“If the insured has a limited interest in the goods insured, but has insured them for their full value, which is perfectly permissible, ... he may, in certain cases, be entitled to recover the full value upon a loss, holding on trust for a third party or parties entitled to the other interest or interests in the goods. Indeed, if he himself has suffered no loss, he may recover the full value for the third party. The essential requirements are that the insured does have an interest in the goods and that, as a matter of construction of the insurance contract, the policy does cover more than that limited interest...”

[119] Counsel submitted further that the defendant's insurance contract²⁸ contained the following relevant clause

“Section I –coverage

We will pay for direct “physical loss or damage” of or damage to Covered Property at the premises described in the Schedule caused by or resulting from any event not specifically excluded or limited by the terms, conditions, clauses, warranties or endorsements of the Policy.

1. Covered property

Covered property means the type of property described in Section I, 1...

Personal property of others that is:

(1) In your care, custody or control; and

(2) Located in or on the building described in the schedule.

However, our payment for loss or damage to personal property of others will only be for the account of the owner of the property.”

[120] Therefore, that the claimant's vehicle was covered under the defendant's insurance policy DAR01261/16 based on the forgoing. Counsel Shillingford Marsh pointed the court to the evidence of Hector Maldonado where he admitted that the Defendant could have claimed compensation for the Claimant's vehicle under this policy but chose not to do so.

[121] Counsel cited and relied on the case of **Hepburn v A Tomlinson (Hauliers) Ltd** ²⁹House of Lords where it was held that carriers were entitled to recover the full value of tobacco for the benefit of the owners.

[122] The Claimants in that case were flour and corn factors who effected a floating policy over the goods in their warehouse, whether their own or those held “*in trust or commission*”. They were able to recover the full value of the goods for the benefit of the owners in **Waters v Monarch Fire and Life Assurance Co (1856) 5 E&B 870**. (emphasis mine)

²⁸ See Nagico Insurance All Risk Policy No. DAR01261/16 in Amended disclosure bundle filed on 21st January 2022

²⁹ (1966) AC 451

- [123] Counsel Shillingford Marsh drew the court's attention to the pre action letter sent to the defendant on the 31st Of October 2017 the defendant on notice of her claim. Counsel submitted that the defendant had notice of the claimants claim intended course of action and that the defendant still in the circumstances did not include the claimant's vehicle in its insurance claim. Counsel submitted that in doing so the defendant acted negligently. That as a result of the defendant's negligence in failing to make the claim that her client has suffered financial loss as a result. She is a retired person who was given the said vehicle as a gift by her late husband. She took impeccable care of the vehicle. This court notes that the claimant did say in her evidence that the vehicle was also of great sentimental value to her.
- [124] Counsel for the claimant further submitted that in light of the seriousness of the harm which the claimant has suffered and that the defendant was aware of the absolute likelihood of harm which the claimant would have suffered and the ease with which the defendant could have simply included the claimant's vehicle in its list of damaged vehicles; and the fact that there was no social need or other good reason why the claimant's vehicle was not claimed; there was certainly a breach of the defendant's duty of care when it failed to claim.
- [125] Counsel urged this court to disregard the excuse proffered by Mr. Maldonado that is that it would have been too "*onerous*" to file a claim and that the policy would not cover an average of 30 vehicles per day on its compound. Counsel contended that in the circumstances there was nothing onerous about simply typing a reference to the claimant's vehicle on the insurance claim form or about simply picking up the phone to ask the claimant about the value of her vehicle. Counsel made reference to the disclosed correspondence between the defendant, its insurer and its broker which showed that the defendant's claims were submitted in various stages and over a period of several months. (Re: email dated 7th November 2019 at page 2 of the 17th November 2021 bundle. See also page 10 of this bundle where the submitted claim contained the words "Sorrell reports estimates to follow" in the place of value of some items claimed.)
- [126] Counsel for the defendant Mrs Blomqvist Williams in her closing submissions simply made the submission that there was no duty to insure the claimant's vehicle and accordingly there was no duty to pay out the insurance proceeds to the claimant.

- [127] Counsel for the defendant did not make any substantive or compelling submissions regarding the claim made by the claimant that the defendant could have made a claim for vehicle under the insurance policy held by the claimant.
- [128] It would appear from her closing submissions that counsel for the defendant failed to fully appreciate the point being made by the claimant regarding the claimant's claim that the defendant was negligent in not making a claim under its insurance policy for her benefit as was clearly pointed out to the defendant's witness in cross-examination by counsel for the claimant.
- [129] Counsel for the defendant in her submissions submitted that the defendant did not have to have a duty to insure a bailor's chattel. Further counsel urged the court to accept Mr Maldonado's explanation on behalf of the defendant that the insurance policy under the head namely 3rd party chattels was for a maximum amount of \$200,000.00 which sum would have been insufficient to compensate all the vehicle owners who had their vehicles in the defendant's premises that day, therefore the defendant did not claim under that head and in fact did not receive any compensation.

Court's considerations:

- [130] With the greatest of respect this court is unable to accept the explanation offered by Mr Maldonado or Counsel Blomqvist Williams submissions regarding the defendant's failure to make a claim under their insurance policy for the benefit of the claimant.
- [131] The provision of the policy which makes provision for the claim for third party property on the defendant's property is pellucid and this court as is explained below is of the considered view that a claim should have been made for and on behalf of the claimant for the damage and loss for her vehicle and in failing to do so the defendant was clearly negligent in their duty as a bailor in the circumstances of the case at bar.

- [132] This court is of the view that the court of appeal decision in the **Mensah Case**³⁰ as by counsel on behalf of the claimant, this court notes that in that even though is not binding on this court is in fact very instructive and persuasive on this court. In that case it was also held that notwithstanding the bailee was found not to be negligent in respect of their care of the bailor's goods their delay in taking effective actions against the insurers and failure to inform the bailor of the insurer's repudiation of liability rendered them liable to the bailor who was the real beneficiary of the sums recoverable under the policy of insurance for the insured value of the goods lost. (emphasis mine)
- [133] In conclusion this court is satisfied that the defendant is culpable because there was a failure to make a claim on their insurance policy for the benefit of the claimant as was clearly available to them. As in the **Mensah case** there was a failure on the part of the defendant company who was the bailee to fulfil its obligation as a bailee. The defendants in the case at bar negligently failed to make a claim under their insurance policy to the disadvantage of the claimant who was the real beneficiary of recoverable sums for the damage and subsequent apparent loss of her vehicle.
- [134] This leaves this court with the consideration as to the extent to the defendant's liability to the claimant. It is well established law that when a court is considering compensation for loss resulting from negligence and wrong doing it is that the "*the aim of the law is to provide a just remedy*" in **Kuwait Airways Corporation -v- Iraq Airways Company and others**³¹ there is guidance in the dicta of Lord Nicholls of Birkenhead when he said

"The aim of the law in respect of the wrongful interference with goods, is to provide a just remedy. ... The fundamental object of an award in respect of this tort, as in all wrongs, is to award compensation for loss suffered. Normally ('prima facie') the measure of damages is the market value of the goods at the time defendant expropriated them. This is the general rule, because generally this measure represents the amount of the basic loss suffered by the plaintiff owner. He has been dispossessed of his good by the defendant. Depending on the circumstances some other measure, yielding a higher or lower amount may be appropriate. The plaintiff may have suffered additional damage consequential on the loss of his goods. Or his good may have been returned."³²

³⁰ Op cit

³¹ [2002] UKHL 10

³² Ibid at paragraph 67

- [135] It is well established law that a person to whom a wrong has been done that person is entitled to recover damages which flow from the wrong. The claimant in this court's view is entitled to the value of the replacement of her vehicle which was never returned to her and which was clearly destroyed and the claimant would also consider that the claimant is entitled to reasonable loss of use of her vehicle. This is based on the fact that the court accepts the claimant's evidence that she contacted Mr Nassief the owner of the defendant company and first made what can be called an informal claim for her loss and this was followed by the letter of intent sent to the defendant which counsel submits would have allowed the claimant to add the claim for the claimant's vehicle. This court agrees with counsel in this regard. (emphasis mine)
- [136] One who has the right to permanent possession is necessarily the owner, and since one entitled to temporary possession only is under a duty, either present or future, to surrender the chattel or its proceeds on demand or to seek the owner and deliver it to him or her, he or she is a bailee. It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. Re: **Sally Wertheim v. Chicoutimi Pulp Company**³³. This case was applied by Justice Ola Mae Edwards in the St Lucia Case of **Joseph Marius Vs Patrick Morille**³⁴ who stated that "If Mr. Marius has suffered damage that is not too remote, he must so far as money can do it, be restored to the position he would have been in had the particular damage not occurred"³⁵
- [137] Where two parties have made a contract which one of them has broken, or where one is under a duty of care which he has breached, the damages which the other party ought to receive in respect of such breach of contract or breach of a duty of care, should be such as may be fairly and reasonably be considered either as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

³³ [1911] AC 301

³⁴ [2005] ECSCJ No. 231

³⁵ Ibid at paragraph 120

[138] The loss of use would be from October 2017 to date as the claimant has yet to be furnished with a replacement vehicle which was quite within the defendant's ability being a thriving car dealership, there obviously has been no attempt to repair and or refurbish the claimant's vehicle by the defendant that was in the business of repairing vehicles.

[139] Notwithstanding that no substitute vehicle has been hired, judges have awarded compensation for loss of use of a vehicle while it is being repaired where it has been shown that inconvenience has been caused or, for example, that the owner has had to use public transport, or walk or that a family have been deprived of the advantage of a family car where otherwise they would have used the car which had been damaged Re: **Lagden v. O'Connor** ³⁶ the House of Lords in this matter essentially rules that the correct test of remoteness of damage is whether the loss is reasonably foreseeable and then take the victim as you find them. In the case at bar the claimant was a retired person who has been deprived of the use of her car and it would only be fair in this court's respectful view that she be compensated for loss of use and the cost of replacing her lost vehicle. There is no doubt in this court's mind that looking at the case in the round that the claimant should be compensated for the loss of use of her vehicle which loss was due to the negligence on the part of the defendant in making the necessary claim on their insurance policy.

[140] These are special damages and it is trite law they must not only be specifically pleaded but must be strictly proved re: *Alexander v. Rolls Royce Motor Cars Ltd*³⁷ and in **Bonnhan Carter -v- Hyde Park Hotel** ³⁸ Lord Goddard CJ said

‘... Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars, and, so to speak, throw themselves at the head of the court saying “This is what I have lost. I ask you to give me these damages”. They have to prove it.’³⁹

[141] In Re: **Kenya Breweries Ltd v. Kiambu General Transport Agency Ltd**⁴⁰. The degree of certainty and particularity depends on the circumstances and the nature of the act complained of. See also **Re: Jivanji v. Sanyo Electrical Co Ltd**⁴¹

³⁶ [2004] 1 AC 1067

³⁷ [1996] RTR 95.

³⁸ (1948) 64 TLR, [1948] WN, 92 Sol Jo 154 KBD

³⁹ Ibid at page 178

⁴⁰ [2000] 2 EA 398 at 416

- [142] The defendant company because of its negligence and/or failure and/or refusal to make a claim under its insurance policy for the destruction of the claimant's vehicle for the benefit of the claimant as provided for in its insurance policy is clearly and without a doubt liable to the claimant in this regard. The amount recoverable would be the maximum sum that the insurers would have accepted as their liability.
- [143] Damages are said to be "*at large*," that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the claimant has sustained. The award of general damages is in the discretion of court in respect of what the law presumes to be the natural and probable consequence of the defendant's act or omission Re: **Gonzalez (Fidel) -v- AG**⁴² **James Fredrick Nsubuga v. Attorney General**,⁴³ and **Erukana Kuwe v. Isaac Patrick Matovu and another**,⁴⁴ and **Tweed and Associates Garage Limited -v- Sylvester Tweed**⁴⁵.
- [144] In the assessment of the quantum of damages, court should mainly be guided by the value of the subject matter, the economic inconvenience that the claimant may have been put through and the nature and extent of the injury or loss suffered Re: **Uganda Commercial bank v. Kigozi**⁴⁶ Furthermore that a claimant who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong Re: **Hadley v. Baxendale**⁴⁷; **Charles Acire v. M. Engola**,⁴⁸ and **Kibimba Rice Ltd v. Umar Salim**,⁴⁹
- [145] This court accepts the submissions made on behalf of the claimant that based on the authorities of:

⁴¹ [2003] 1 EA 98

⁴² (1999) 57 WIR 393

⁴³ H.C. Civil Suit No. 13 of 1993

⁴⁴ H.C. Civil Suit No. 177 of 2003).

⁴⁵ [1993] ECSCJ 73

⁴⁶ [2002] 1 EA 305

⁴⁷ (1894) 9 Exch 341

⁴⁸ H. C. Civil Suit No. 143 of 1993

⁴⁹ S. C. Civil Appeal No. 17 of 1992).

- a. **Hepburn -v- A Tomlinson (Hauliers) Ltd**⁵⁰ where the carriers were held to be entitled to recover the full value of the tobacco for the benefit of the owners.
- b. **Waters -v- Monarch Fire and Life Assurance Co**⁵¹ where the claimant held a fire policy on goods held in their warehouse both owned by them and goods held in trust or on commission. After a fire destroyed the good it was held that they could recover the whole loss and not just the value of their own goods belonging to others had to then of course be paid to the owners of the goods.

Disposition:

- [146] Judgment is therefore entered on behalf of the claimant for the value of her vehicle lost and destroyed in the Hurricane Maria whilst it was in the care and custody of the defendant as a bailee on the sole ground that the bailee failed and or neglected to make the necessary claim under its policy of insurance for the damage and loss of the said vehicle.
- [147] The claimant is entitled to loss of use of the said vehicle from the time that the claimant made an attempt to recover the loss of her vehicle to the hearing of this matter.
- [148] Costs is to be the claimants' costs on the amount to be assessed based on the value of the claim.
- [149] This court wishes to apologise to the parties for the inordinate length of time that it took to produce this judgment. Counsel is aware of the constraints encountered by the court. This court however, wishes to record its appreciation to counsel for their submissions and for their assistance in emailing the information requested by the court which enabled the court to complete this judgment.

M E Birnie Stephenson

High Court Judge

BY THE COURT

REGISTRAR

⁵⁰ 1996 AC 451

⁵¹ (1856) 5 E & B 870